

# Special Needs Trusts vs ABLE Accounts

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## The Introduction of ABLE Act

- When ABLE Accounts were first proposed, some thought it would be the end for special needs trusts
- ABLE Accounts can actually supplement and enhance special needs trusts
- This presentation will review the basics of both ABLE Accounts and special needs trusts and the advantages and disadvantages of both vehicles to protect individuals who require “needs-based” public assistance

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## Public Assistance Programs

- There are 2 categories of Public Assistance Programs
  - “Needs-Based” Programs require the beneficiary:
    - To have low income and few assets (available resources), and
    - Be sufficiently blind, old or disabled
  - “Non Needs-Based” Programs only require the beneficiary:
    - Be sufficiently blind, old or disabled (does not require beneficiary to have low assets or income)
    - May have other requirements

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## Common “Needs-Based” Programs

- Supplemental Security Income (SSI)
  - Has Income + Resource requirements to be eligible in addition to being disabled
  - Provides income benefits to persons with qualified disabilities and the elderly
- Medicaid (Mo HealthNet)
  - Federal welfare program that each state has its own statutes and regulations
  - Many states base their Medicaid eligibility on SSI qualification
    - Missouri is a 209(b) state

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## Common “Needs-Based” Programs

- Veteran’s Pension Benefits
  - May qualify for assistance from the Veterans Administration if the veteran meets certain financial criteria
  - In addition, a qualifying spouse of an eligible veteran may also be eligible for benefits
- Subsidized Housing
  - An individual who is sufficiently blind, disabled, or old and has low income and assets may be eligible to receive benefits from several different assisted housing programs

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## Only “Needs-Based” Benefits Require Protection of Assets

- Planning to reduce a person’s “available resources” is only needed if the person is receiving “need-based” public assistance or if the person may become eligible for assistance in the future
- Two main reasons a person who has special needs is not eligible for “needs-based” assistance is:
  - The individual has too much income, or
  - The individual has too many resources

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## How to Reduce an Individual's Income and/or Available Resources to Qualify for "Needs- Based" Assistance?

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Special Needs Trusts

vs

ABLE Accounts

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## Why use a Special Needs Trust?

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- To reduce resources for persons with disabilities as not available so as to retain needs-based benefits
- To improve the quality of life

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## Special Needs Trusts Requirements

- Written
- Distributions discretionary by the trustee
- Beneficiary not entitled to receive income or principal automatically
- Trustee prohibited from making any distributions that would jeopardize beneficiary's eligibility for benefits; Trust may have clause permitting such distributions if in the best interest of trust beneficiary
- Disabled individual usually is the sole beneficiary of the trust during their lifetime
- Irrevocable

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## Different Types of Special Needs Trusts

- Third Party Special Needs Trusts
- Self-Settled Special Needs Trusts
  - d4A Self-Settled Special Needs Trust
  - d4B Miller Special Needs Trust
    - In Missouri used for home and community based waiver MO Health Net services
  - d4C Pooled Special Needs Trust

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# Special Needs Trusts

Trust Type	(d)(4)(A), Self-Settled	(d)(4)(C), Pooled	Third-party SNT
Established by	Individual, Parent, Grandparent, Guardian or Court	Individual, Parent, Grandparent, Guardian or Court	Other than Trust Beneficiary
Assets Funding	Disabled person	Disabled person	Third person (Can be a parent)
Beneficiary	Disabled person only	Disabled person	Anyone
Grantor Trustee	No	No	Yes
Distributions	To third parties	To third parties	To third parties
Payback	Yes	Yes	No
Disability	SSA Definition	SSA Definition	SSA Definition
GiftTax Exclusion	Cannot use	Cannot use	Can use
Testamentary	No	No	Yes
Age Limit	Funded by 65	No (check state) In Missouri, 65	None
Frequent used for	PI or Inheritance	Same but lesser	Any use

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## First Party vs Third Party Trusts

- Whose assets are going to fund the trust?
  - First Party: Individual with disabilities/beneficiary’s own assets
    - Personal injury settlement, worker’s compensation award, direct gift or inheritance
  - Third Party: Family member’s or other individual’s assets
    - A contrived distinction

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## First Party Special Needs Trust

- Trust must be funded with assets of sole beneficiary
- Beneficiary must be under age 65 when the trust is established and funded
- At present, a first party SNT can be established by an individual, court, parent, grandparent or guardian
- Trust must include a Medicaid payback provision
- Trust must be irrevocable

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## Self-Settled SNT 42 U.S.C. §1396p(d)(4)(A)

- Self-Settled Special Needs Trust
- Created for the sole benefit of an individual with disabilities; under age 65, established by the individual, a parent, grandparent, guardian or court
- Created during lifetime
- Irrevocable
- Medicaid reimbursement at death of the trust beneficiary to all states that have provided medical assistance
- Must be funded before the beneficiary reaches age of 65 with trust beneficiary's own funds

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## Self-Settled SNT 42 U.S.C. §1396p(d)(4)(C)

- Pooled SNT
- Created and administered by a non-profit organization that holds the resources of many beneficiaries but maintains each individual's assets in a separate account
- Irrevocable
- No age limit for beneficiary in the Federal statute
  - Some states, including Missouri, impose age limit of 65
- Non-profit organization can retain a portion of the trust fund at death of beneficiary
  - Up to 100% of Trust Corpus

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## Third Party Special Needs Trust

- Trust must be funded with assets that do not belong and are not controlled by the beneficiary
- No payback provision is required
- Trust can be drafted to benefit more than one beneficiary
- Trust can be created by will or during life

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## Drafting Considerations

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- Not just a form
- Risk
  - Loss of client benefits
  - Attorney malpractice
  - Disciplinary action
- Grantor trust provisions for income tax/Qualified Disability Trust Exception
- Net income passed through to beneficiary
  - Most on government benefits are in marginal tax brackets

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## Drafting Considerations

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- Health, Education, Maintenance, Support
  - Refraining from using that standard
- Cost of trust document and trust administration vs. use of ABLE Accounts

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## Taxes and Special Needs Trusts

- Although attorneys, trustees and financial advisors have become increasingly familiar with the complex public benefit rules that apply to Special Needs Trusts, there is less of an understanding with regard to the tax rules that apply to SNTs
- It is important for the trustee of a SNT to understand that in addition to the IRS, other State and Federal agencies will likely review the SNT's income tax return
  - This can include: state and local Medicaid offices, the SSA and/or public housing agencies

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## Advantages of Special Needs Trusts

- Allows assets to be held for the benefit of a person with special needs so that the beneficiary's life is enhanced by the special needs trust and the assets in the trust are not deemed "available" and "countable" resources
- Allows large sums of money and other assets to be held for the benefit of the beneficiary without disqualifying the beneficiary from "needs-based" benefits
- Assets are managed by a trustee, rather than the beneficiary

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## Advantages of Special Needs Trusts

- Unique assets can be held in a special needs trust
  - Businesses
  - Real property
  - Rental property
  - Art work
  - Farm land
  - Jewelry
  - Life insurance

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## The ABLE Act

- Public Law 113-295
  - Became Federal Law December 19, 2014
    - Missouri Law in 2015
    - RSMO §166.600 et. seq.
  - Legislation was envisioned and written by the ARC/United Cerebral Palsy
    - Same advocates who lobbied for 42 USC §1396p(d)(4)(A)(B)and(C)

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## ABLE Act

- Designed to be a less complicated and less expensive alternative to a special needs trust
  - Like a SNT:
    - Assets held in an ABLE Account will be exempt resource for SSI/Medicaid eligibility
- No attorney involvement necessary
- Designed as a tax-advantaged investment

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## ABLE Act – Modeled after 529 Plans

- IRC Reg §529A (26 IRC §529A)
  - Awaiting IRS implementation of regulations
  - Social Security and many state agencies have issued their rules about Medicaid, SSI and ABLE Accounts

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## What is an ABLE Account?

- An ABLE account, like a 529 plan account, but designed for an individual with disabilities
- A limited amount of money can be contributed to an ABLE account without disqualifying the beneficiary from needs-based public assistance
- The ABLE account can grow tax free
  - Income generated by the principal in the ABLE account is not taxable

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## ABLE Account Facts

- Money in the ABLE account is not an available resource for needs-based public benefit programs
- But the person has to qualify for the ABLE account, and there are restrictions on how money in an ABLE account can be used without adverse consequences
- ABLE accounts are not property of a conservatorship estate
  - Mo. Rev. Stat. §209.625 (August 28, 2019)

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## Purpose of an ABLE Account

- Encourage individuals and families to save money to support disabled individuals while maintaining eligibility for Social Security and Medicaid benefits
- Cheaper to establish than a special needs trust

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## Who Qualifies for an ABLE Account?

- Disabled or blind before age of 26, and
  - Receiving Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI),  
**or**
  - Have a satisfactory “disability certification”

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## Disability Certification

- Signed certification, by the account holder, that a signed physician's diagnosis of disability exists, occurred before the age of 26, and can be provided upon request
- Regulations regarding specific form and frequency of the disability certification are still in development

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## ABLE Account Limits

- One ABLE account per disabled individual
- All contributions must be in cash, never in-kind
- Annual contributions cannot exceed \$15,000
  - Same as gift tax exemption, will increase when gift tax exemption increases

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## ABLE Account Limits

- Must remain under \$100,000 total to receive SSI
  - If over \$100,000, SSI will be temporarily suspended
    - Less important in Missouri
- Account can be up to \$325,000 to maintain Medicaid eligibility
  - State specific

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## ABLE Account Requirements

- Must be disabled before age 26
  - Originally no age limit
  - 2016 Congressional Bill to raise age limit to 46
    - Bill not enacted
    - Disability community continues to advocate for increases in age
- Limit of one account per beneficiary
  - Problem of dueling divorced parents

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Uses for ABLE Accounts

- “Qualified Disability Expenses”
  - “any expenses related to the eligible individual’s blindness or disability which are made for the benefit of an eligible individual who is designated beneficiary, including the following expenses”

Education	Housing	Transportation	Employment Training and Support
Assistive technology and personal support services	Expenses for oversight and monitoring	Prevention and wellness	Financial management and administrative services
Legal fees	Health	Funeral and burial expenses	Other approved expenses

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Penalties on “Unqualified” Distributions

- Unqualified disability expenses
  - Distribution is taxable income to the account beneficiary
  - 10% penalty
- No penalty if distribution is made after death of designated beneficiary

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## Penalties on Distributions

- Account holder no longer disabled
  - ABLE Account can continue
  - Any distribution is taxable income to account beneficiary
    - No longer any qualified disability expenses
  - No more contributions to ABLE Account
  - Can reinstate ABLE Account status if disability returns

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## Medicaid Payback

- At death of account owner
- Medicaid, only, paid back (Mo HealthNet)
- Payback limited to time period in which ABLE Account existed
  - Helpful in 1st Party SNT situations

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## Benefits of ABLE Accounts

- SSI Recipients can have housing costs paid by an ABLE Account, without incurring reduction to their monthly benefits
  - Unlike a special needs trust
- ABLE Accounts can be savings accounts without affecting benefits
- Limit on Medicaid payback
- Third party contributions to an ABLE account can be made by a trustee of a special needs trust because trust beneficiary has a beneficial interest in the trust not a legal interest
  - See POMS SI 01130 TN 74, Issued March 8, 2018

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## Benefits of ABLE Accounts

- Quick, easy depository for moneys over the \$2,000 Medicaid resource limit
- No “sole-benefit” rules for SSI recipients
- At death of account beneficiary, can pay funeral expenses prior to satisfaction of Medicaid payback claim
  - Unlike Special Needs Trusts

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## Changes under the Tax Cuts and Jobs Act

- ABLE account owners now have more options to fund money into ABLE accounts
  - If the ABLE account owner works, a portion or all of their earnings can be contributed to their account
  - Additional contribution is limited based on the poverty line for a single person household
    - In 2019, this limit is \$12,140 in the continental U.S.
    - The account owner is NOT eligible for this option if his or her employer makes contributions to a workplace retirement plan

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## Changes under the Tax Cuts and Jobs Act

- Saver's Credit now available to ABLE account owner after 2018-
  - Allows ABLE account owner to qualify for a Saver's Credit
  - Based upon contributions made by the ABLE account owner to his/her ABLE account
  - Credit is given on up to \$2,000 of contributions made in a given year
  - Saver's Credit is a special credit given to low and moderate income workers
    - Credit will be claimed on Form 8880 – Credit for Qualified Retirement Savings Contributions and will reduce the participant's taxes or increase their tax refund

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## Changes under the Tax Cuts and Jobs Act

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- Rollover from 529 plans are allowed into ABLE accounts with restrictions
- Can be rolled over from the ABLE account owner's 529 plan or from a 529 plan from certain family members

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## Challenges with ABLE Accounts

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- Medicaid payback provision for third-party money
  - Unlike third-party special needs trust
- Not eligible for Qualified Disability Trust favorable tax treatment
- May need a guardianship to establish if no parent is available or account beneficiary is unable to execute a Durable Power of Attorney

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## Challenges with ABLE Accounts

- Age restriction of 26 before onset of disability
- Cannot establish an ABLE Account by a SNT trustee with SNT corpus unless authority in trust document
  - New Social Security rules permit a special needs trust to fund an ABLE account

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## ABLE Accounts vs Special Needs Trust

	ABLE Accounts	Third Party SNT	Self-Settled d4A	Special Needs Trusts d4c (Pooled)
Whose assets in account or trust	Third Party's or Beneficiary's	Not the Beneficiary's	Beneficiary's	Beneficiary's
Limitations	Disability must begin before age 26; only \$15,000 per year can be distributed	None, other than beneficiary's assets cannot be added	Beneficiary must be under age 65	May have transfer penalty if beneficiary puts assets in after 65
Who Establishes	Beneficiary; or Beneficiary's guardian, parent or DPOA agent	Not the beneficiary	Beneficiary, parent, grandparent, guardian or court	Beneficiary, parent, grandparent, guardian or court
Who Controls the account or trust	Beneficiary or someone acting on beneficiary's behalf	Any person (other than the beneficiary) or corporation	Any person (other than the beneficiary) or corporation	Only non-profit organization that established the master trust

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ABLE Accounts vs Special Needs Trust				
	ABLE Accounts	Third Party SNT	Self-Settled d4A	Special Needs Trusts d4c (Pooled)
Who can benefit	Only the Beneficiary	Beneficiary and others chosen by Settlor	Only the Beneficiary	Only the Beneficiary
Is there a separate written agreement	No custom drafted; must enroll with ABLE program offered by the state	Yes, custom drafted trust agreement	Yes, custom drafted trust agreement	Not custom drafted; join a master trust created by a non-profit organization as trustee
When to use	When someone wants to gift to beneficiary or beneficiary has too many assets	When someone wants to give (or leave at death) assets to benefit someone else	When beneficiary receives settlement, gift or inheritance or has accumulated assets prior to disability or when turning 18	When beneficiary receives settlement, gift or inheritance or has accumulated assets prior to disability or when turning 18
Repay Medicaid upon death?	Yes, but only Medicaid received after ABLE account starts	No	Yes, all Medicaid beneficiary received during life	Depends on what pooled trust negotiated with state, but usually all remaining assets paid to either Medicaid or retained by trustee

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ABLE Accounts vs Special Needs Trust				
	ABLE Accounts	Third Party SNT	Self-Settled d4A	Special Needs Trusts d4c (Pooled)
No. of Accts	1 per Beneficiary	Unlimited	Unlimited	Unlimited
Fees	Financial Institution Fees	Attorney and Trustee Fees	Attorney and Trustee Fees	Attorney and Trustee Fees
Investment Options	Investment strategies may be changed twice annually	No restrictions	No restrictions	No restrictions
Valid Distributions	Broadly defined “disability expenses” including basic living expenses	Any expense for sole benefit of beneficiary with certain implications for distributions for food and/or shelter	Any expense for sole benefit of beneficiary with certain implications for distributions for food and/or shelter	Any expense for sole benefit of beneficiary with certain implications for distributions for food and/or shelter

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QUESTIONS?

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THANK YOU!

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